

7 Official Opinions of the Compliance Board 225 (2011)

Minutes – Procedures – Posting on website not required

Closed Session Procedures –

General – Practices in violation – Failure of presiding officer to complete closing statement; failure to include meaningful information

Administrative Function –

Within Exclusion

- Signing documents and letters not requiring decision-making;**
- Discussion of repairs to equipment – Separate meeting on administrative matters.**

Outside Exclusion

- Receipt of information on land-use matters; Briefing on matters as initial step in policy formation.**

Meeting – Closed Session Statement – Meeting of quorum with cabinet members

Exceptions Permitting Closed Sessions –

- Personnel, §10-508(a)(1) – Within Exception – Discussion of specific individual's attributes.**
- Personnel, §10-508(a)(1) – Outside Exception – Discussion of department responsibilities**
- Business Relocation, §10-508(a)(4) – Within Exception – Discussion of retention of business in the County**
- Public Security, §10-508(a)(10) – Within Exception – Discussion of location of 911 center involving security issues**
- Property Acquisition, §10-508(a)(3) – Within Exception – Discussion of acquisition of agricultural easement**

Minutes – Contents – Practices in Violation –

- Failure to provide meaningful summary of closed session**
- Failure to identify persons present**

June 27, 2011

Complainant

Mr. Craig O'Donnell

Respondent

Carroll County Commissioners

We have considered the complaint of Mr. Craig O'Donnell ("Complainant") that the County Commissioners of Carroll County ("Commissioners") violated the Open Meetings Act (the "Act") with respect to fourteen closed meetings in January and February 2011 and with respect to various general practices relating to meetings.

We shall recite the facts and state our conclusions as we go along.

I

Discussion

A. Allegations that the Commissioners should post their minutes on their website.

The Act requires only that a public body make its minutes "open to public inspection during ordinary business hours." § 10-509(d) of the State Government Article ("SG"). Complainant does not allege that he was denied the right to inspect minutes, and we therefore find no violation of the Act in this regard.

B. Use of chief of staff's signature on closing statements.

Complainant alleges that the Commissioners' chief of staff signs closing statements for the presiding officer. The Commissioners state that they have granted their chief of staff authority to execute documents on their behalf, and they describe this practice as "perfectly legal." They further explain that all of the Commissioners are newly elected and that their Clerk is newly appointed.

The Act assigns to the public body's presiding officer, and to no one else, the duty to "conduct a recorded vote on the closing of the session" and "make a written statement of the reason for closing the meeting, including a citation of the authority [under SG§ 10-508], and a listing of the topics to be discussed." SG § 10-508(d)(2). While the Act does not require the presiding officer to sign the closing statement, that officer's signature serves to prove his or her adoption of a statement prepared by staff and thus would demonstrate compliance with SG § 10-508(d)(2).

Here, whatever the authority of the chief of staff to sign documents for the presiding officer, his signature does not demonstrate that the presiding officer complied with SG § 10-508(d)(2). In fact, we cannot ascertain from the closing statements provided to us whether the presiding officer played any role in preparing them. It is important for public bodies to view the closing statement as an accountability tool, 4 *OMCB Opinions* 188, 196 (2005), not merely a technicality. Under § 10-508 (b), a public body meeting in a session closed under a § 10-508(a) exception must not discuss matters exceeding that exception and the topics disclosed on the closing statement. The Act's requirement that the presiding officer complete the closing statement before the public body meets in closed session enables that officer to limit the members' discussion to those topics and the scope of that exception. A presiding officer who has not prepared, or has not adopted a pre-prepared, closing statement, may have difficulty fulfilling that function, especially if he or she has not brought the closing statement to the closed session for reference.

We encourage this newly-elected body to view their votes to close a session on stated grounds as a promise to the public to discuss only the stated topics, and the closing statement as an aid to fulfilling that promise. Neither the presiding officer's duty to make the closing statement nor the members' duty to confine their closed-session discussions to the listed topics may be delegated to staff. The presiding officer's signature on the closing statement, while not expressly required by the Act, publicly establishes both that officer's undertaking as to the permissible parameters of the discussion and the public body's compliance with the written statement requirement.

C. Allegations that the closing statements do not provide the information required by the Act.

Complainant alleges that the Commissioners' closing statements do not contain the information required by SG § 10-508(d). The Commissioners state that they will provide more information in the future. We shall use the fourteen closing statements in question as a means of providing prospective advice to this recently-elected body.

The Commissioners' closing statements were prepared on the form closing statement provided as Appendix C to the Attorney General's *Open Meetings Act Manual*. That form corresponds to the SG § 10-508(d) requirement that the closing statement include three pieces of information: (1) a citation to the SG § 10-508(a) exception relied on for closing the meeting; (2) the reason for closing the meeting; and (3) the topics to be discussed. Under "Statutory Authority," the form provides a checklist of the fourteen exceptions. It contains a heading for "Topics to be discussed" and a heading for "Reasons for closing," both with blanks to be filled in by the presiding officer.

Of the fourteen closing statements at issue here, five contain no citation to an exception. All five list “Administrative” as the reason for closing the session. The closing procedures set forth in § 10-508(d) do not apply to a public body’s exercise of an administrative function. The only provision of the Act that applies to the exercise of that function is § 10-503(c), which provides:

If a public body recesses an open session to carry out an administrative function in a meeting that is not open to the public, the minutes for the public body’s next meeting shall include:

- (1) a statement of the date, time, place, and persons present at the administrative function meeting; and
- (2) a phrase or subject identifying the subject matter discussed at the administrative function meeting.

We therefore find that the lack of information on these five closing statements themselves does not violate SG § 10-508. Whether the subjects discussed were truly administrative poses a different question, which we shall address in Section I.D of this opinion.

Four closing statements cite the exception provided by SG § 10-508(a)(1) for the discussion of personnel matters. Three state “Personnel” under the “Reason for closing” heading and contain no entry under the “Topics to be discussed” heading; the fourth contains no entry under either heading. As the Commissioners now recognize, these closing statements do not comply with § 10-508(d).

At a minimum, a closing statement claiming the personnel matters exception should provide enough information to inform the public that the discussion does indeed fall within the exception. The topic to be discussed or reason for closing should thus show that the discussion will involve the personal attributes or performance of specific individuals and will not instead involve broader policy, which would be implicated when anyone in the position would be affected by the action being considered and which would therefore not fall within the exception. 3 *OMCB Opinions* 335, 337 (2003). Further, a public body should disclose on the closing statement as much information as it can without revealing the information that the Act permits the public body to keep confidential. See 1 *OMCB Opinions* 16, 17 (1992) (stating that the Act does not require the public body to disclose information that would compromise the confidentiality of a discussion properly falling within an exception). We encourage the Commissioners to view the closing statement as a mechanism which, when used properly, can serve to protect them against

unwarranted suspicions that they are privately conducting business which the law requires them to conduct publicly.

Two closing statements claim the exception provided by SG § 10-508(a)(4) for the consideration of “a preliminary matter that concerns the proposal for a business ... to locate, expand, or remain in the State.” Both state “Economic development” as the reason for closing and provide no other information. We have not stated a generally-applicable rule for how much information must be provided by a public body claiming this exception, because the information that the public body can disclose without compromising the confidentiality of the discussion will vary with the circumstances. For instance, a public body will likely be able to disclose more information about a discussion involving a proposal by a business which has publicized its intention to negotiate incentives with that public body than about a business which has insisted on strict confidentiality even as to its identity. We can say, however, that “economic development” is insufficient: that phrase did not demonstrate that the Commissioners closed the meeting to discuss a particular business’s or organization’s proposal to locate, expand, or remain in the County.

Two closing statements claim the exception provided by SG § 10-508(a)(10) for the discussion “of public security, if the public body determines that public discussion would constitute a risk to the public or public security....” The reason given for the closing on each is simply “public safety.” Again, the closing statement must reflect the requirements of the claimed exception. This exception required the Commissioners to find preliminarily that public discussion of the topic would constitute a risk to the public or public security.

One closing statement claims the exception provided by SG § 10-508(a)(3) for the consideration of “the acquisition of property for a public purpose....” It gives “land acquisition” as the reason for closing and states no topic to be discussed. The repetition of the language of the statutory exception, without more, does not satisfy the Act. 1 *OMCB Opinions* 191, 193 (1996). Again, the amount of information that can be disclosed will vary with the situation. *Id.* The presiding officer should exercise his or her discretion as to how much information can be divulged without prejudicing the public body’s ability to negotiate the terms of the specific acquisition.

We commend the Commissioners for undertaking to provide sufficient detail on future closing statements.

D. Allegations that the closed session discussions either did not involve the exercise of an administrative function or did not fall within the scope of the exception cited for the closing.

Five meetings were closed to discuss matters the Commissioners termed “administrative”; nine were closed under various exceptions under § 10-508.

The five administrative sessions. The five sessions held to discuss “administrative” matters were described in closing statements and minutes of the open meetings as (1) a session on “record retention and data protection,” involving a discussion of the “county’s computer system’s security measures and firewalls”; (2) a session at which the Commissioners “[were] presented with the Ethics Commission yearly report, approved Memorial Day flags, a request for cell towers setbacks to be developed and an update on the boilers in the County Office building”; (3) a session at which the Commissioners “were presented with Letters of Congratulations and Boards and Commissions appointment/reappointment letters for Board signature”; (4) a session at which the chief of staff “shared...the Monocacy Scenic River Advisory Board Report [,]... discussed the Maryland Association of Counties (MACo) “Buddy System [,]” ... shared a response from the Board of Education regarding the Free and Reduced Meal Program [,]..and noted the March 8th budget session date”; and (5) a session at which the chief of staff “met with the Board to discuss organizational processes to facilitate the goals of the ... Commissioners] and where “[v]arious forms of requests for meetings and actions by the Board were discussed.”

For the principles governing our determination of which of these subjects involved the exercise of an administrative function as defined by SG §§ 10-502 (b) and hence excluded from the open-meeting requirement of the Act under § 10-503, we refer all parties to our opinion in 3 *OMCB Opinions* 105 (2001).¹ There, as here, a complainant alleged that the Carroll County Commissioners were holding closed meetings on topics required by the Act to be discussed publicly, and the Commissioners, as here, responded that Carroll County lacks an executive and that they were performing their executive, now termed “administrative,” function in those meetings. *Id.* There, we concluded:

Although the County Commissioners, in their role as the executive for Carroll County government, have some latitude to hold closed meetings that are simply not covered by the Open Meetings Act, in certain respects the Commissioners have overstepped the bounds of the “executive function” exclusion from the Act.

¹ That complaint involved 16 meetings.

We then “attempt[ed] to provide general guidance about compliance with the Act, under the difficult circumstances facing a public body with dual government functions.” *Id.*

Here, we conclude that the Commissioners were acting in their executive capacity, and thus performing their administrative function, in certain respects, but that they likely overstepped the bounds of the administrative function exclusion in others.

The Commissioners exercised executive (or administrative) functions insofar as they met merely to sign letters implementing decisions made earlier, to discuss County equipment, including computer systems and the boiler, to discuss a program included in the Commissioners’ membership in the Maryland Association of Counties, and to discuss the use of forms, if those forms merely implemented existing policies or rules. The imparting of information about the date of the budget session likely also involved the “executive function phase of budget preparation.” *Id.* at 109. These matters involved the Commissioners’ administration of County government. *See* 1 *OMCB Opinions* 23, 27 (1993) (finding, in a county without an executive, that the commissioners’ receipt of a briefing about cuts in State aid involved the administration of the county government and thus fell within the exclusion); *see also* 1 *OMCB Opinions* 233, 236 (1997) (finding that commissioners’ discussions about procedures involved the “administ[r]ation of existing law through their internal operating methods”).

The applicability of the administrative exclusion to the other topics is less clear. We have stated that “information-gathering at the earliest stages of policy formation is part of the ‘consideration ... of public business’” under SG § 10-502(g). *Id.* We encourage the Commissioners to review the guidance we gave in 3 *OMCB Opinions, supra*, at 113, where we declined to apply the administrative exclusion to staff briefings, including events at which staff “made sure the Commissioners are aware of the contents of their packets.” *Id.* After reiterating our conclusion in prior cases that “briefings exactly like this are part of the Act’s openness mandate,” we stated that “line-drawing between the mere provision of information and the advancing of a point of view is often difficult at best.” *Id.*

We again decline to declare that the receipt of information from staff is in itself an administrative function. We are also unable to conclude from the information before us that the discussion of these remaining topics fell within the exclusion. With respect to the second session, we do not know whether the Commissioners “were presented with” a copy of the annual Ethics Commission report in furtherance of an administrative responsibility or as an initial step in policy formulation. We do not know whether the Commissioners

were presented with every listed item, including “approved Memorial Day flags,” or whether they “approved” the flags and the succeeding items. In any event, one of those items, whether the Commissioners approved it or were simply presented with it, was “a request for cell towers setbacks to be developed.” Under SG § 10-503(b)(2), a public body meeting to consider a “zoning matter” is not exercising an administrative function excluded from the Act. The Commissioners’ receipt of this request in a closed session likely violated the Act.

With respect to the fourth session, we do not know whether the briefing by the chief of staff on the Monocacy Scenic River Advisory Board Report, the Board of Education response regarding the Free and Reduced Meal Program, and the use of organizational processes to “facilitate [the Commissioners’] goals” constituted “information-gathering.” If the communications with the Board of Education involved “the particulars of how the school board is implementing a previously adopted budget,” that discussion could constitute an exercise of the administrative function. 1 *OMCB Opinions* 23, 24 (1993).

From the information available to us, we find it likely that mingled into the Commissioners’ administrative functions meetings was the receipt of information on matters required to be discussed in public, especially with regard to the request for setbacks. We encourage the Commissioners to meet publicly in case of doubt on whether a function is administrative.

The four sessions closed under the “personnel matters” exception. As set forth in Section I.3 above, SG § 10-508(a)(1) permits a public body to close a meeting in order to discuss personnel matters involving the personal attributes or performance of specific individuals, but not involving matters implicated when anyone in the position would be affected by the action being considered. 3 *OMCB Opinions, supra*, at 337. The closed-session minutes provided to us show that the commissioners properly closed all four sessions in order to discuss the qualifications and appointments of specific individuals for specific positions. In the fourth session, however, the Commissioners also “divided the [Department] Directors’ responsibilities.” If that discussion involved, and was inseparable from, a discussion of the attributes of the new appointees, then it fell within the exception. If, on the other hand, the Commissioners’ division of responsibilities was in the nature of a job classification, applicable to the positions without regard to any individual’s attributes or performance, the Act required that discussion to be held in public.

The two sessions closed under the “business location” exception. Two closing statements claim the exception provided by SG § 10-508(a)(4) for the consideration of “a preliminary matter that concerns the proposal for a business ... to locate, expand, or remain in the State.” The closed-session minutes provided to us show that the first involved the retention of an identified business in the County; the second pertained to ongoing discussions with that business. These topics fell within the exception.

The two sessions closed under the “public security” exception. Two closing statements claim the exception provided by SG § 10-508(a)(10) for the discussion “of public security, if the public body determines that public discussion would constitute a risk to the public or public security...” At the first, the Commissioners discussed the relocation of the 911 center, a topic that could include not only the new address of the center, which Complainant maintains is public, but also other logistical matters that would fall within the exception. The Commissioners’ response confirms that the “public safety implications and security of the existing and possible new facilities were discussed.” The discussions thus fell within the exclusion.

The session closed under the “land acquisition” exception. SG § 10-508(a)(3) provides an exception for the consideration of “the acquisition of property for a public purpose...” Complainant alleges that the open-session minutes demonstrate the inapplicability of this exception; they refer to an approval to the Agricultural Land Preservation program “to move forward on the second option” and to the Department of Recreation and Parks “to move forward on exploring alternate locations.” Carroll County’s agricultural preservation program acquires easements, and we consider this acquisition of an interest in real property to fall within the exception.

E. Allegations that the summaries of the closed sessions do not provide the information required by the Act.

SG § 10-509 (c)(2) requires a public body which has met in a session closed under SG § 10-508 to include in the minutes of its next regular session a “statement of the time, place, and purpose of the closed session” and a “listing of the topics of discussion, persons present, and each action taken during the session,” among other things. Complainant alleges that the Commissioners’ summaries do not specify the duration of the sessions and are uninformative.

With respect to duration, we construe the requirement that the public body specify the “time” of the closed session to refer to the time the session was convened; had the Legislature intended “duration,” it could have so specified. We note that the term “time” also appears in § 10-506(b), requiring that public

notice of a meeting specify the “date, time, and place” of the meeting. We therefore find that the Commissioners’ failure to specify the duration of the closed session did not violate the Act.

With respect to the adequacy of the information in the summaries, we refer to, and need not repeat, our explanation of the controlling principles in 3 *OMCB Opinions* 173, 178-79 (2002), where we also addressed a complaint that the Carroll County Commissioners’ summaries had violated SG § 10-509 (c)(2). Boiled down, those principles require “a meaningful description of the topics discussed” and do not require information that would compromise the confidentiality of the session. *Id.* We commend the Commissioners’ undertaking to provide more detail in the future, and we note that the Commissioners have provided additional detail in their response.

F. Allegation that the Commissioners violated the Act by meeting in an administrative session before the publicly-noticed open session on February 1, 2011 and that the motion to close the open meeting was deficient.

The only provision of the Act that applies to the Commissioners’ exercise of their administrative function is § 10-503 (c), which only applies when they close a public session for that purpose. The Commissioners thus were not required to complete § 10-508 closing statements for the administrative session they held before their public meeting.

Complainant alleges that the videotape of the Commissioners does not reflect an adequate motion to close the open meeting on February 1, 2011. The minutes do reflect a motion to close the meeting, and, as Complainant points out, the minutes, not the videotape, are the official record. The adequacy of the Commissioners’ various closing statements is discussed above.

G. Allegation that the Commissioners did not comply with the Act on January 18, 2011, when the Mt. Airy Town Council “met informally” with them to “work together on developing the Harrison Leishear property.”

Complainant alleges that no minutes were kept; the County has provided them. This allegation appears to be moot.

H. Allegations that the Commissioners' meetings with their department heads, or "cabinet," are subject to the Act.

We addressed this precise issue at length in 3 *OMCB Opinions* 105, *supra*, and refer all parties to that Opinion. The short answer is that the Commissioners might be exercising their administrative function when meeting in a quorum to discuss budget preparation matters, but that the development of other policy or legislation must be done in the open unless an exception has been properly invoked. *Id.* at 110-111. While the Commissioners correctly observe that the Act exempts the local equivalents of the Governor's Cabinet from the definition of "public body," *see* SG § 10-502 (h)(3), that exemption does not extend to the Commissioners themselves when they meet as a quorum with the Department heads to discuss matters required by the Act to be discussed in public.

J. Allegations that the closed session summaries do not reflect the presence of the chief of staff.

The governing principles do not require much discussion. A summary of a closed session must include a list of the "persons present." SG § 10-509 (c)(2). Sometimes, identifying a person by name would compromise the confidentiality of the session, as when the public body is interviewing candidates for a position or speaking with representatives of a business seeking to locate in the jurisdiction. *See, e.g., 5 OMCB Opinions* 86, 92 (2006). In such cases, the public body should identify the persons generically. *Id.* The Act does not permit the public body to omit their presence altogether. *Id.*

Here, the summary of the second closed session on January 20, 2011 reflects the presence of the Commissioners and the fact that they "were presented with" documents to sign. The summary does not refer to the person doing the presenting. When the Commissioners close an open meeting to convene an administrative session, § 10-509(c)(2) applies, and the summary should list everyone present. When an administrative session is instead a separate session, the Act does not apply. The fact that the chief of staff signed closing statements does not establish that he attended the subsequent closed sessions, but, if he did, the Act required the Commissioners to list him in the summary.

II

Conclusion

We conclude that the Commissioners violated the Open Meetings Act by failing to include meaningful information on their closing statements on the topics to be discussed and the reasons for closing. We further conclude that they likely discussed matters in closed session that exceeded the scope of the administrative exclusion, particularly their receipt of a request for a land-use regulation. We commend their undertaking to provide additional information on future closing statements and summaries of closed sessions and encourage their presiding officer to review and sign closing statements.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
Julio A. Morales